IN THE

Supreme Court of the United States

October Term, 1978

No. 78-702

THOMAS ZARCONE,

Petitioner,

v.

WILLIAM M. PERRY and JAMES WINDSOR,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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October 26, 1978

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CITATIONS.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner, Thomas Zarcone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on July 28, 1978 affirming the decision of the United States District Court for the Eastern District of New York.

Opinions Below.

The opinion of the Court of Appeals affirming the decision of the District Court is not yet officially reported. It is reproduced in Appendix A to this Petition at p. A1.

The memorandum decision and order of the District Court is reported at 438 F. Supp. 788 (1977). It is reproduced in Appendix A to this Petition at p. A14.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 28, 1978. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the plaintiff as a prevailing party in a civil rights action who recovered compensatory and punitive damages on his own behalf is also entitled to an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988?

2. Whether the obtaining of competent counsel pursuant to a contingent fee arrangement by the plaintiff who ultimately recovered compensatory and punitive damages on his own behalf in a civil rights action constitutes sufficient "special circumstances" which render an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, unjust?

3. Whether the plaintiff as a prevailing party in a civil rights action who recovered compensatory and punitive damages on his own behalf should properly be denied an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 where from the outset it was clear that the prospects of substantial monetary recovery were good, in view of the clear wrongfulness of the defendants' conduct and the injuries incurred by plaintiff?

Statutory Provisions Involved.

Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, §2, 90 Stat. 2641 [amending 42 U.S.C. §1988 (1866)] enacted October 16, 1976.

In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement of the Case.

Zarcone retained counsel in May, 1975 in connection with his claim that Perry and the other defendants had deprived Zarcone of his constitutional rights in violation of 42 U.S.C. §1983 and committed other tortious violations against him.

Zarcone entered into a contingent fee arrangement with his attorney whereby one-third of any recovery after disbursements would be paid to his attorney.

The jury awarded Zarcone $80,000 compensatory damages against Perry and Deputy Sheriff James Windsor; $60,000 punitive damages against Perry; and $1,000 punitive damages against Windsor. The jury found in favor of two plain-clothes policemen who had also been named as defendants in the suit.

Under the contingent fee arrangement Zarcone's counsel became entitled to $46,496.63 out of monies actually recovered or to be collected pursuant to the contingent fee arrangement.

Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York denied Zarcone's motion for an award of attorney's fees in the sum of $53,917.50 under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988), without a hearing in the absence of a showing that Zarcone's suit had advanced the interests of the public or of an identifiable group.

The Court of Appeals in affirming the District Court's denial of an award of attorney's fees stated:

> Although we do not subscribe to his [Judge Mishler's] reasoning, we affirm on other grounds.

App. A., *infra*, p. A2.

In a separate and unsuccessful appeal taken by Perry from the award of punitive damages, the Court of Appeals set forth the background facts as follows [572 F. 2d 52, 53-54 (2d Cir. 1978)]:

> The incident that gave rise to the lawsuit occurred on April 30, 1975. On that night, then Judge Perry was in his chambers during a break in an evening session of traffic court in Suffolk County, Long Island. Zarcone was operating a mobile food vending truck outside the courthouse. Perry asked Deputy Sheriff Windsor to get some coffee, which he did. Both Perry and Windsor thought the coffee tasted "putrid", and Perry told Windsor to get the coffee vendor and bring him "in front of me in cuffs." Perry directed two plainclothes officers, who happened to be nearby, to

accompany Windsor. Wearing his sheriff's uniform equipped with badge, gun and handcuffs, Windsor went to Zarcone and told him that the judge said the coffee was terrible and that Zarcone had to go inside to see the judge. Windsor handcuffed Zarcone, despite the vendor's protestations that it was not necessary. When Zarcone said he was too embarrassed to go into the courthouse that way, one of the officers suggested that Zarcone walk between them with Zarcone's jacket over his hands.

The group then marched through the hallway of the courthouse, in full view of dozens of people. Zarcone heard someone yell that they were locking up the frankfurter man. When they arrived at Perry's chambers, the judge asked if the Sheriff had "the coffee vending man there in handcuffs." Upon entering the chambers, Perry ordered Zarcone to be left "in handcuffs until I get finished with him." A pseudo-official inquisition then began. Zarcone stood in front of the judge's desk, behind which the judge sat. A court reporter was present, along with Windsor and the two police officers. Perry told Zarcone that "I have the two cups of coffee here for evidence." According to Zarcone, whom the jury must have believed, Perry then started screaming at him, threatening him and his "livelihood" for about 20 minutes, and thoroughly scaring him. Just before Zarcone was allowed to leave, Perry commanded Windsor to note Zarcone's vehicle and vending license numbers and told Zarcone, "Mister, you are going to be sorrier before I get through with you."

After Zarcone left, he resumed his mobile truck route and came back to the night traffic courthouse about 45 minutes later. Shortly thereafter, Windsor returned and told Zarcone they were to go back to the judge. Zarcone asked if he had to be handcuffed again, but Windsor said no. When they reappeared before Perry, he told Zarcone that he was going to have the two cups of coffee analyzed. Perry also said that if Zarcone would admit he did

> something wrong, then Perry would drop the charges. Zarcone consistently denied that anything was amiss with the coffee, and no charges were filed.
>
> • • •
>
> The unfortunate occurrence was publicized at the time, and ultimately led to the removal of Judge Perry from the bench.[2] There were unpleasant consequences for Zarcone as well: He testified that he was very upset by the incident, that he could not sleep, and that he started to stutter and get headaches. Zarcone also required treatment at the Coney Island Hospital, he could not work, and his wife asked him to move out of the house.

The Court of Appeals characterized what happened to Zarcone in the strongest terms, i. e.:

> . . . the unlawful dragonning before a star chamber proceeding. . . .

572 F. 2d at 55. Furthermore, that Perry's actions constituted a

> . . . blatent disregard of [Zarcone's] constitutional rights. . . .

572 F. 2d at 56. The court noted

> . . . Perry's position, his relationship of power and authority to plaintiff, who was a simple coffee vendor, the handcuffing, threats and intimidation inflicted upon plaintiff. . . .

[2]The Appellate Division of the New York Supreme Court, Second Division, upheld findings that Perry had violated several canons of judicial ethics in running roughshod over Zarcone's constitutional rights and that Perry had testified falsely at his disciplinary proceeding. *In re William M. Perry,* 53 A. D. 2d 882 (2d Dept.), appeal dismissed, 40 N. Y. 2d 1079 (1976).

572 F. 2d at 57 and characterized Perry's actions as

> . . . outrageous conduct. . . .

572 F. 2d at 57. The court concluded by observing that

> . . . the abuse of official power here was intolerable. . . .

572 F. 2d at 57.

The Court of Appeals held below that

> [W]here a plaintiff sues for damages and the prospects of success are sufficiently bright to attract competent private counsel on a contingent fee basis, the underlying rational of the *Newman-Northcross** rule may be inapplicable, since no financial disincentive or bar to vigorous enforcement of civil rights may exist.

App. A., *infra,* p. A11.

Before concluding that an award of attorney's fees was wholly unnecessary to achieve the purposes of the Civil Rights Attorney's Fees Award's Act, (App. A., *infra,* p. A13) the court stated the relevant factors which lead to its affirmance.

> From the outset it was clear that the prospects for a substantial monetary recovery were good, in view of the clear wrongfulness of the challenged conduct, and the injuries and the hospital costs incurred by plaintiff. Thus it was apparent that counsel fees would not present a significant barrier to institution and prosecution of a suit for damages. Indeed, plaintiff obtained competent counsel on a contingent

*Note: Reference is made to the rule adopted by this Court in *Newman v. Piggie Park Enterprises,* 390 U.S. 400, and *Northcross v. Memphis,* 412 U.S. 427.

> fee basis, apparently without any unusual difficulty. The prosecution of his claim resulted in a judgment totalling $141,000, including $61,000 punitive damages, out of which plaintiff's counsel has received $26,000 and is entitled to a total of $46,496.63 according to the contingent fee agreement.
>
> Moreover, appellant was a private attorney general only in an attenuated sense. Although the defendant's conduct was intolerable from the standpoint of the public interest, it is unlikely to recur, and appellant sued on his own behalf for damages to redress an essentially private injury. [Footnote omitted]

App. A., *infra*, p. A12.

REASONS FOR GRANTING THE WRIT.

1. The decision below conflicts with the decisions of other Courts of Appeals as to the proper interpretation of the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988).

The decision below is in clear conflict in principle with the decisions of other Circuit Courts of Appeal.

This is best illustrated by the recent case of *Sargeant v. Sharp*, 579 F. 2d 645 (1st Cir., May 16, 1978). In *Sargeant v. Sharp, supra,* plaintiff sought declaratory and injunctive relief and damages, pursuant to 42 U.S.C. §1983 and other statutes based upon the refusal of officials of the Massachusetts Department of Public Welfare to conduct prompt and complete implementation of a fair hearing decision theretofore rendered by the Welfare Department. The substantive claim was settled by a consent decree leaving the issue of attorney's fees to the Court. The principal attorney had received a substantial portion of the $88,816.58 recovery as a contingent fee. Two issues were

before the Court. One was whether a more formal hearing was required on the issue of attorney's fees and secondly, whether or not

> . . . the District Court Judge abused his discretion by basing his denial of the motion for attorney's fees on improper standards.

579 F. 2d at 647.

The Court in *Sargeant v. Sharp, supra,* recognized that the District Court had broad discretion to make the initial determination as to whether to allow an award of attorney's fees. However, it reiterated

> . . . the standard controlling the discretion of the Court in civil rights actions, *i.e.*, that a successful plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust."

579 F. 2d at 647.

The Court went on to analyze the decision below in view of this Court's rulings in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) and *Northcross v. Board of Educ. of Memphis City Schools*, 412 U.S. 427 (1973) and both the Senate Judiciary Committee Report [S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) *reprinted* in 1976 *U.S. Code Cong. & Admin. News* 5908, *et seq.*] and House Judicial Committee Report [H. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976)]. In concluding that the case was ". . . atypical of civil rights actions . . . ." 579 F. 2d at 648, the Court also stated:

> However, we reiterate that a fee arrangement is irrelevant to the issue of entitlement and should not enter into the determination of the amount of a reasonable fee. A private fee arrangement is not in

> itself "special circumstances which would render an award unjust," and unless the court finds such circumstances, it may not deny fees in this case. If the court sets the fee amount and determines that counsel has already received remuneration equal to or above that amount and that the award will not go to compensate the plaintiff, it would be an abuse of its discretion to deny the award of fees solely on that basis. Such a decision would be undesirable as a "windfall" to the defendants, a frustration of the congressional policy of encouraging the private enforcement of civil rights actions, and perhaps an unwarranted interfering with a voluntary attorney-client fee agreement which is not in itself excessive.

579 F. 2d at 649.

The First Circuit Court of Appeals remanded the case to the District Court indicating that proper consideration be given to the plaintiff's claim for counsel fees ". . . using the guidelines we have set forth."

579 F. 2d at 649.

Clearly, a direct conflict in principle exists between the Second Circuit's holding in the case at bar and the First Circuit's decision in *Sargeant v. Sharp, supra.*

An analysis of the Civil Rights Attorney's Fees Awards Act was made by the Third Circuit in *Hughes v. Repko,* 578 F. 2d 483 (3d Cir. 1978) where the sole issue concerned the prevailing plaintiff's application for attorney's fees under the Act. At the time plaintiff retained counsel, he agreed that his fee would be limited to any amount awarded by the Court. The Third Circuit Court of Appeals discussed the District Court's consideration of factors it felt should effect an award of fees. Specifically, the lower court concerned itself with the quality of counsel's

work and the contingency of success. It found the quality to have been good but the case a simple one. Additionally, the District Court felt that plaintiff's ability to pay their counsel was a factor to be considered.

Chief Judge Seitz, who delivered the opinion of the Court, wrote:

> The simplicity of the issues involved should be reflected in the court's determination of the hours reasonably devoted to the successful claims, a determination that must be made in arriving at the lodestar itself. Any other approach would penalize attorneys regardless of the number of hours reasonably devoted to successful claims.

578 F. 2d at 487. The Court also stated:

> We similarly feel that the so-called contingency factor . . . may not be used to decrease the amount of the final fee award.

578 F. 2d at 487-8. The Court added:

> In so concluding, we do not intend to suggest agreement with the district court's finding that the optimism of the plaintiff's counsel as to the outcome of the litigation is a proper consideration at any time in evaluating the contingency factor.

578 F. 2d at 488.

In his concurring opinion, Judge Garth stated:

> As I stated at the outset, my only purpose in writing this concurring opinion as a supplement to Chief Judge Seitz's excellent majority opinion is to explicate my view as to the steps a district court judge must take to comply with the mandate of the Civil Rights Attorney's Fees Awards Act and our attorney's fee decisions. I have always felt that this

> court owes a particular responsibility to the district court to specify in detail our precise requirements. It is in this spirit that I have undertaken to enunciate my understanding of the attorney fee award process.

578 F. 2d at 493.

Judge Garth also noted:

> To reduce the fee award in a case where there is a strong likelihood of success makes little sense. Such a reduction unfairly penalizes the attorney who is employed to prosecute a case where the constitutional or statutory violation is clear. Moreover, the defendant is penalized where the case against him is weak.

578 F. 2d at 491.

Thus the Third Circuit's standards for awarding attorney's fees, under the Civil Rights Attorney's Fees Awards Act, rejects those factors that the Second Circuit has expressly adopted in denying to petitioner at bar, an award of attorney's fees pursuant to the Act.

2. The decision below conflicts with the decisions of this Court.

This Court has ruled that the standard controlling the proper exercise of the discretion of a court in civil rights actions is that a successful plaintiff

> . . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.

Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). See also *Northcross v. Board of Educ. of Memphis City Schools*, 412 U.S. 427 (1973).

3. (a) The decision below threatens the effectiveness of private action as a vital means for enforcing the civil rights policy of the United States.

(b) The Court should formulate standards to be employed with reference to the awarding of attorney's fees to prevailing plaintiffs in civil rights litigation as it has with respect to prevailing defendants.

(c) An important question of federal law is involved herein.

Setting forth standards to be followed, the report submitted by the Committee on the Judiciary of the House of Representatives, H. R. Rep. No. 94-1558, 94th Cong. 2d Sess., (hereinafter *House Report*) emphasized the need for judicial discretion in awarding reasonable fees to the prevailing party to ensure that the legal fees would attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. *House Report* at 6-9.

The report specifically states:

> Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees.

House Report at 8.

Also, that the effect of the bill

> . . . will be to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens.

House Report at 9.

Equally significant is the following language analogizing the antitrust laws to civil rights acts:

> Under the antitrust laws, for example, a plaintiff may recover treble damages and still the court is required to award attorney fees. The same principal should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment.

House Report at 8-9.

The Court has heretofore granted certiorari where an important question existed and because of doubtful determination by the Court below, *Williams v. Lee,* 358 U.S. 217, 218. This Court granted certiorari in *Perma Life Mufflers v. International Parts Corp.,* 392 U.S. 134 and noted that the rulings by the Court of Appeals

> . . . seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States.

392 U.S. at 136.

The case of *Christianburg Garment Co. v. Equal Employment Opportunity Commission,* 98 S. Ct. 694, decided January 23, 1978, sets forth the guidelines for the awarding of attorney's fees, pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. §1988, as said statute pertains to a prevailing defendant. The opinion of the Court was delivered by Mr. Justice Stewart. The opinion states that certiorari was granted

> . . . to consider an important question of federal law . . .

98 S. Ct. at 697.

This Court ruled and established standards and guidelines awarding attorney's fees, under the Act, to prevailing defendants in civil rights actions.

This Court should grant certiorari, establish standards and guidelines for awarding attorney's fees, under the Act, to prevailing plaintiffs in civil rights actions.

As professor Martin A. Schwartz* has observed:

> [T]he Zarcone court upheld the denial of fees because defendant's egregious denial of plaintiff's constitutional rights and the concomitant 'bright' prospects of a substantial monetary recovery allowed plaintiff to secure competent counsel on a contingent fee basis without any difficulty. Since Congress's principle purpose in enacting the fee statute was to insure that private parties would not be deterred from enforcing their civil rights, the Zarcone court reasoned that fees should not be awarded in cases where there is "no financial disincentive or bar to vigorous enforcement of civil rights . . . ."
>
> This reasoning appears to be unsound. It means that defendant is protected against a fee award and plaintiff is denied fees because defendant's wrongs against plaintiff rose to a sufficient egregious level. It simply makes little sense to penalize the plaintiff and provide the defendant with a windfall because defendant's conduct constituted a clear violation of plaintiff's section 1983 rights. At best, the fact that there was a clear violation of rights might be relevant in determining the hours reasonably necessary to prosecute plaintiff's claim. It should not serve as a basis for denying plaintiff's entitlement to any fee award.

*Assistant adjunct professor of law at New York Law School, staff attorney and member of the research and appeals bureau of Westchester Legal Services, Inc.

> Nor is the fact that plaintiff secured representation on a contingent fee basis a valid reason for denying fees. As the First Circuit recently concluded, the entitlement to fees should be addressed as 'an antecedent and separate question . . . without regard to the existence of a private fee arrangement.' (*Sargeant v. Sharp*). A fees award in this situation should generaly serve to "reimburse the plaintiff, with any excess over the amount set by the fee agreement going to [plaintiff's] counsel". [Citations Omitted.]

Schwartz, *Poverty Law,* New York Law Journal, Vol. 180, No. 64, Sept. 19, 1978, p. 1, 30.

> If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976) *reprinted in* 1976 *U.S. Code Cong. & Admin. News* 5913.

Conclusion.

For the foregoing reasons the petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ARNOLD B. FIRESTONE,
740 Veterans Memorial Hwy.,
Hauppauge, New York 11787,
Attorney for Petitioner.

October 26, 1978.

APPENDIX A--
OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 679—September Term, 1977.

(Argued March 27, 1978 Decided July 28, 1978.)

Docket No. 77-7509

THOMAS ZARCONE,

Plaintiff-Appellant,

—against—

WILLIAM M. PERRY and JAMES WINDSOR,

Defendants-Appellees,

ROBERT J. ANDERSON and PATRICK GIAMBALVO,

Defendants.

Before:

FEINBERG, MANSFIELD, and OAKES,

Circuit Judges.

Appeal from an order of the Eastern District of New York entered by Chief Judge Jacob Mishler denying appellant's motion for an award of attorney's fees sought under the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988 after appellant, in a civil rights action on his own behalf, had obtained a judgment in the sum of $141,000, out of which his counsel is entitled to $46,496.63 under a contingent fee agreement.

Affirmed.

ARNOLD B. FIRESTONE, Esq., Hauppague, N.Y. (Firestone & Chekenian, Hauppague, N.Y.), *for Plaintiff-Appellant.*

STEPHEN P. BURKE, Esq., Mineola, N.Y. (O'Brien Kelly & Rode, Mineola, N.Y.), *for Defendant-Appellant Windsor.*

WILLIAM J. FULLAM, Esq., Merrick, N.Y. (Curtis, Hart & Zaklukiewicz, Merrick, N.Y.), *for Defendant-Appellee Perry.*

MANSFIELD, *Circuit Judge:*

The issue upon this appeal is whether appellant, who successfully recovered compensatory and punitive damages in a civil rights action on his own behalf in the Eastern District of New York, is also entitled to an award of attorney's fees under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988.[1] Chief Judge Mishler denied an award of attorney's fees in the absence of a showing that the suit had advanced the interests of the public or of an identifiable group. Although we do not subscribe to his reasoning, we affirm on other grounds.

Since the background facts are fully set forth in our prior decision in the case, 572 F.2d 52 (2d Cir. 1978), we need only summarize them briefly here. On April 30, 1975, appellee Perry, then a judge of the District Court of Suf-

1 Section 1988 now provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

folk County, was presiding over an evening session of traffic court. During a break, he dispatched appellee Windsor, a deputy sheriff, to purchase coffee from appellant Zarcone, whose mobile food vending truck had made a stop in front of the courthouse. Dissatisfied with the coffee, which he described as "putrid," Perry ordered Windsor and two others to bring appellant back to his chambers through the crowded courthouse in handcuffs, and then tongue-lashed the vendor, threatening him with legal action and the loss of his livelihood. About an hour later, Judge Perry again summoned appellant before him and sought an admission that something had been wrong with the coffee. However, appellant consistently refused to admit that anything had been amiss. As a result of this incident, appellant alleged that he suffered from anxiety, persistent headaches and stuttering, required treatment in a hospital, experienced marital difficulties, and was unable to work.

Eventually appellant retained counsel under a contingent fee arrangement whereby one-third of any recovery after disbursements would be paid to his attorney, and filed this action. Not surprisingly, he persuaded a jury that the conduct of Judge Perry and Deputy Sheriff Windsor had been without any colorable legal basis and constituted a denial of his right to due process. He was awarded $80,000 in compensatory damages, $60,000 in punitive damages against Perry, and $1,000 in punitive damages against Windsor. Upon an appeal only of the punitive damages award, we affirmed. Under the contingent fee agreement, appellant's counsel became entitled to $46,496.63 out of the recovery.

In the meantime, however, appellant had moved to amend the Bill of Costs to add counsel fees of $53,917.50. On Sept. 30, 1977, Judge Mishler filed his decision deny-

ing this motion. After reviewing the origins of the Civil Rights Attorney's Fees Awards Act of 1976, the lower court characterized appellant's action as "basically a tort action for false arrest and imprisonment couched in the language of the constitutional right to due process." He noted that appellant had sought only damages—as opposed to equitable relief the benefits of which might be shared by others—and stated that appellant's action had vindicated the rights of the public generally "[o]nly in a general, indirect sense." Accordingly, he denied appellant's request for counsel fees, concluding, "[I]t is only when plaintiffs advance the public interest by bringing the action that an award of attorney's fees is proper." On appeal, appellant contends that his request for fees was improperly rejected because of the district judge's use of the wrong standard, and that application of the proper standard entitles him to an award of counsel fees as a matter of law.

DISCUSSION

The Civil Rights Attorney's Fees Awards Act of 1976 (the "Act") amended 42 U.S.C. § 1988 to provide that in any action to enforce 42 U.S.C. § 1983 (the Civil Rights Act of 1866), "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." This provision was passed in response to the Supreme Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), which held that federal courts may not award counsel fees to successful litigants in the absence either of express statutory authority or the presence of circumstances permitting application of certain very limited exceptions to the "American Rule" against fee-shifting. S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976) (hereinafter *Senate Report*); H.R. Rep. No. 94-1558, 94th

Cong., 2d Sess. 2 (1976) (hereinafter *House Report*); 122 Cong. Rec. S16,251-52 (daily ed. Sept. 21, 1976) (remarks of Senator Kennedy). Although *Alyeska* itself involved environmental law, the Court's reasoning also disapproved the practice of awarding fees to civil rights plaintiffs on the so-called "private attorney general" theory. *See also Runyon* v. *McCrary,* 427 U.S. 160, 182-86 (1976).

Almost immediately members of Congress recognized that *Alyeska* would produce anomalous gaps and inconsistencies in private enforcement of federal statutes protecting civil rights, since some, but not all, of these provisions explicitly authorized fee-shifting. Bills were introduced in both Houses to remedy the omission, which led ultimately to passage of the Act.

The impetus for attorneys' fees legislation was Congress' concern, substantiated by the testimony of numerous members of the legal community in Senate and House hearings, that private parties would be deterred from enforcement of the civil rights laws unless they could anticipate that success would result in a recovery sufficient to cover their costs, including reasonable attorneys' fees. See *Senate Report* at 2-5; *House Report* at 2-5. *Alyeska* was seen as a significant threat to Congress' heavy reliance on private enforcement as a means of implementing its civil rights legislation.[2]

The *Senate Report* stated:

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a

2 Indicative of the importance Congress attached to this legislation were the efforts of the bill's sponsors in the Senate to obtain passage of the bill despite a mini-filibuster on the eve of the Senate's adjournment for the 1976 elections, see, e.g., 122 Cong. Rec. S16478 (daily ed. Sept. 23, 1976) (cloture motion), and legislative history indicating Congress' intention that the Act apply to all cases pending in the courts at the time of its passage. See, e.g., *House Report* at 4 n.6.

> meaningful opportunity to vindicate the important Congressional policies which these laws contain.
>
> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court. *Id.* at 2.

In expressly authorizing awards of attorneys' fees in actions to enforce federal civil rights laws that made no express provision for fee-shifting, Congress did not undertake to specify detailed standards governing the propriety or amount of such awards. Rather, as the language of the Act makes clear, this was left to the direction of the district courts in the first instance. The *House Report* stated:

> The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. . . . The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing [the Act]. *Id.* at 8 (footnote omitted).

Thus Congress anticipated that courts would exercise their discretion under the Act in a manner consistent with case law that had developed concerning the fee-shifting provisions of the Civil Rights Act of 1964, 42 U.S.C.

§§ 2000e-3(b), 2000e-5(k) and other comparable statutes. This expectation was consistent with the legislation's character as an incremental measure designed to plug gaps in existing statutory authority. For instance, the *Senate Report* approved the Supreme Court's holding in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968) (per curiam), to the effect that successful plaintiffs in suits for injunctive relief brought under Title II of the Civil Rights Act of 1964 "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." [3]

The Act's legislative history is clear that in authorizing awards of attorneys' fees to plaintiffs in civil rights actions Congress was concerned with enforcement not only of the civil rights of the public at large and of identifiable groups but also with the rights of individual plaintiffs. Its goal was to remove financial impediments that might preclude or hinder "private citizens," collectively or individually, from being "able to assert their civil rights," *Senate Report* at p. 2. Indeed, we recently remarked in *Davis* v. *Village Park II Realty Co.,* No. 77-7506 (2d Cir. April 21, 1978), slip op. at 2645, that attorneys' fees might be shifted in an individual action for damages under circumstances where it was quite possible that the plaintiff would recover only nominal damages. We therefore reject

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3 It stated:

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968). Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.
>
> Senate Report at 4-5 (footnote omitted).

the view that, to be eligible for shifting of attorneys' fees, the civil rights plaintiff is obligated to show that his action resulted in direct benefits to others, rather than in benefits solely to himself.

Appellant, however, argues that, despite the Act's language making an award of attorney's fees discretionary, he is entitled to such an award as a matter of right under the Supreme Court's decision in *Newman,* which was quoted with approval in the Senate and House Reports on the Act, and *Northcross* v. *Board of Education,* 412 U.S. 427 (1973). Specifically, appellant points to the Court's statement in *Newman* that the successful civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," 390 U.S. at 402, which was followed in *Northcross.* Appellant urges that under this principle, sometimes referred to as the *"Newman-Northcross* Rule,"[4] the district court had no choice in this case but to exercise its discretion in his favor, since no circumstances are shown that would counter the *Newman-Northcross* presumption, and because there was evidence that Perry interposed some defenses in bad faith, a contention which appellees dispute. This necessitates an examination of the meaning and scope of the so-called *Newman-Northcross* rule.

In *Newman* the representative plaintiffs in a class action succeeded in enforcing Title II's ban on racial discrimination in public accommodations in a suit for injunctive relief against several drive-in restaurants and a sandwich shop. The Court stated:

> "When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.
>
> It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 401-02, (footnotes omitted).

4 *Cf. Fort* v. *White,* 530 F.2d 1113, 1118 (2d Cir. 1976); *Carrion* v. *Yeshiva University,* 535 F.2d 722, 727 n.7 (2d Cir. 1976).

Plainly, therefore, the holding in *Newman* was a self-conscious effort to give substance to the Congressional purpose of reducing the financial deterrent to enforcement of Title II by private attorneys general. Formulation of that holding in terms of a presumption was appropriate because only a firm assurance that fees would be recoverable could overcome the reluctance to file Title II suits for injunctive relief—which could not possibly pay for themselves—and because successful Title II litigants could invariably be characterized as private attorneys general, vindicating civil rights of broad public interest. In short, absent fee-shifting, it was unlikely that these important rights could be

enforced effectively through private lawsuits for injunctive relief.

This rationale was applied in three subsequent Supreme Court cases. In *Northcross* v. *Board of Education,* 412 U.S. 427 (1973), the Court held that this standard should be applied to requests for fees made pursuant to § 718 of the Emergency School Aid Act of 1972, noting that the "plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions." 412 U.S. at 428. Likewise, in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975), the Court extended the *Newman-Northcross* rule to actions for injunctive relief brought under Title VII, again stating that the *Newman-Northcross* rule would serve to vindicate the public interest in such suits.[5] Finally, in *Christiansburg Garment Co.* v. *EEOC,* 98 S. Ct. 694 (1978), a case dealing primarily with the awards of fees to defendants in Title VII cases, the Court reiterated that this rule is not a hard-and-fast interpretation of statutory language, but rather a reflection of an attempt to reduce the financial barriers to suits by private attorneys general. 98 S. Ct. at 697-701.

Thus the *Newman-Northcross* rule is not to be applied woodenly without consideration of the underlying factors which generated it. On the contrary, the Supreme Court has made it clear that in determining whether attorneys'

5 Consistent with the reasoning in *Newman* and *Northcross,* we applied the *Newman* presumption in *Beazer* v. *New York City Transit Authority,* 558 F.2d 97 (2d Cir. 1977), petition for cert. granted, 46 U.S.L.W. 3651 (1978) (No. 77-1427), a case in which the plaintiffs sought broad equitable relief on behalf of a class as well as limited monetary relief for themselves in the nature of backpay. The cost of the litigation and the consequent benefits to others were plainly disproportionate to the sum that the plaintiffs might reasonably have expected to recover on their own behalf. *Accord, Mid-Hudson Legal Services, Inc.* v. *G & U Inc.,* No. 78-7119 (2d Cir. June 15, 1978), slip op. at 3507-14.

fees should be awarded to a prevailing civil rights plaintiff, the principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorneys' fees would be paid if he were successful. This was indeed the situation in *Newman* where the plaintiff sought only injunctive relief and, as the Court noted, "cannot recover damages," 390 U.S. at 401. However, where a plaintiff sues for damages and the prospects of success are sufficiently bright to attract competent private counsel on a contingent fee basis, the underlying rationale of the *Newman-Northcross* rule may be inapplicable, since no financial disincentive or bar to vigorous enforcement of civil rights may exist.

This is not to say, of course, that in an appropriate case the nature and extent of the rights and interests at stake may not be considered by the trial judge in determining whether to shift attorneys' fees. For instance, when the claim involves civil rights of broad significance, prosecuted on behalf of a large class, and the prospective monetary award, if the suit is successful, would be modest in relation to the time, effort and skill required of counsel, the district court must weigh these factors in determining whether to award fees. In such a case the prospect of an award supplementing the fees that the successful plaintiff might be able to pay would be essential to attract competent counsel. Other factors entitled to consideration are the size of the benefits conferred by the suit on the public or on others, the amount of any fund created by the litigation (and its adequacy to cover the plaintiffs' costs and compensate him for actual damages), the presence or absence of any bad faith or obdurate conduct on the part of either party, and any unjust hardship that a grant or denial of fee-shifting might impose.

Applying these principles here, the circumstances clearly call for affirmance of Chief Judge Mishler's denial of an award of attorney's fees. Furthermore, no purpose would be served by a remand for further consideration of the issue since no award would be justified. From the outset it was clear that the prospects for a substantial monetary recovery were good, in view of the clear wrongfulness of the challenged conduct, and the injuries and hospital costs incurred by plaintiff. Thus it was apparent that counsel fees would not present a significant barrier to institution and prosecution of a suit for damages. Indeed, plaintiff obtained competent counsel on a contingent fee basis, apparently without any unusual difficulty. The prosecution of his claim resulted in a judgment totalling $141,000, including $61,000 punitive damages, out of which plaintiff's counsel has received $26,000 and is entitled to a total of $46,496.63 according to the contingent fee agreement.

Moreover, appellant was a private attorney general only in an attenuated sense. Although the defendant's conduct was intolerable from the standpoint of the public interest, it is unlikely to recur, and appellant sued on his own behalf for damages to redress an essentially private injury.[6]

6 We do not suggest that a plaintiff who does not proceed by means of a class action or asks for equitable relief may never invoke the standards of the *Newman-Northcross* rule. On the contrary, where an individual suit for damages can be characterized as a test case, involves legal issues of recurrent public importance, or is otherwise imbued with the public interest, the concerns underlying the *Newman-Northcross* rule appear applicable. See, e.g., *Stolberg* v. *Members of the Board of Trustees*, 474 F.2d 485, 490 (2d Cir. 1973) ("[A]n award of counsel fees is necessary to protect against the possibility that other faculty members might be reluctant to engage in activities protected by the First Amendment or might forgo the vindication their rights to do so in a court of law. Such a result would be destructive of the educational process in a free society.")

Nor are we influenced by the fact that plaintiff's underlying federal constitutional claim might also have served as the basis for a state tort action. As the Supreme Court said in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), "[§ 1983] is supplementary to the state remedy."

Finally, contrary to appellant's contention, there is not a sufficient showing in this record that Perry acted in bad faith in defending this suit to justify a remand in this case. In short, an award of attorney's fees in the present case is wholly unnecessary to achieve the purpose of the Act.

For these reasons, although the district court in our opinion took an overly restrictive view of its function under the Act, a remand for reconsideration is unnecessary,[7] since application of the relevant factors could lead only to the same result.

The order of the district court is affirmed.

7 In *Newman* the Supreme Court reversed the lower court and directed the entry of an award of fees without remanding for reconsideration by the lower court of its contrary decision in light of the proper legal standards. 390 U.S. at 402 & n.5.

APPENDIX A--MEMORANDUM OF DECISION
AND ORDER OF THE DISTRICT COURT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -

75 C 1619

THOMAS ZARCONE,

Plaintiff,

-against-

WILLIAM M. PERRY, JAMES WINDSOR, ROBERT J. ANDERSON, PATRICK GIAMBALVO, PHILIP F. CORSO, EUGENE R. KELLEY and THE COUNTY OF SUFFOLK, NEW YORK,

Memorandum of Decision and Order

Defendants.

September 21, 1977

- - - - - - - - - - - - - - - - - - - -

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MISHLER, CH. J.

On April 30, 1975, at about 7:20 P. M., William M. Perry, a district judge of Suffolk County, presiding over night traffic court in Hauppauge, requested Deputy Sheriff James Windsor to buy coffee from Thomas Zarcone, a coffee vendor, who was regularly stationed outside the courthouse. After tasting the coffee and expressing disapproval of its quality, Perry directed Windsor to bring Zarcone before him, and, if necessary, place him in handcuffs. He also suggested that Robert J. Anderson and Patrick Giambalvo, police officers present in his chambers at the time, accompany Windsor. Zarcone was handcuffed and brought before Perry. On September 30, 1975, Zarcone filed a complaint against Perry, Windsor, Anderson, Giambalvo and the County of Suffolk under 42 U.S.C. §1983, and against Eugene R. Kelley, Commissioner of Police of Suffolk County, and Frank J. Corso, Sheriff of Suffolk County, charging the negligent training and supervision of police officers and deputy sheriffs. The court dismissed the complaint against the County of Suffolk in a memorandum of decision and order dated March 22, 1976, and against Corso and Kelley in a memorandum of decision and order dated April 6, 1976.[1]

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[1] The court is advised that an action is pending in the state court against Kelley, Corso and the County of Suffolk based on the incident of April 30, 1975.

On July 20, 1977, a verdict was rendered after trial by jury in favor of Zarcone and against Perry and Windsor. The jury awarded compensatory damages of $80,000 and punitive damages of $61,000 ($60,000 against Perry and $1,000 against Windsor). The jury found in favor of Anderson and Giambalvo. Judgment was entered on July 20, 1977. Plaintiff now moves under 42 U.S.C. §1988 for ". . . a reasonable attorney's fee as part of the costs."[2]

The Congress authorized the award of reasonable attorneys' fees as part of the costs in Civil Rights Acts

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[2] 42 U.S.C. §1988 was amended (effective October 19, 1976) by the addition of the following sentence:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

not otherwise authorized,[3] in response to Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612 (1975) and Runyon v. McCrary, ___ U.S. ___, 96 S.Ct. 2586 (1976).[4] In those cases, the Supreme Court refused to award attorneys' fees to the prevailing plaintiffs on the ground that such costs are not usually recoverable in federal litigation unless Congress so provides. The Court held in Runyon:

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[3] The Civil Rights Act of 1964 provided for the award of reasonable attorneys' fees in Title II (discrimination in places of public accommodations, Section 204 (b) of the Act (42 U.S.C.§2000a-3(b)) and Title VII (discrimination in employment, Section 706(k) of the Act (42 U.S.C.§2000e-5(k)). Voting Rights Act Amendments of 1975 (denial or abridgment of right to vote on account of race or color)(42 U.S.C. §1973 1(e)).

[4] Alyeska was an action by several environmental groups to enjoin the Secretary of Interior and others from granting rights of way and special land use permits necessary to construct the Alaska pipeline on a claim of a violation of the Mining Lease Act of 1920, 30 U.S.C. §185, and of the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq. (479 F.2d 842); Runyon was a class action charging racial discrimination in denying admission of black students into private schools in violation of 42 U.S.C. §1981.

which these laws contain.

S. Rep. No. 94-1011, 94th Cong., 2nd Sess. 2 (1976) reprinted in 5 U.S. Code Cong. & Admin. News 5908, 5910.

The reference in the Senate Report[5] to the opinions in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 88 S.Ct. 964 (1968) and Hall v. Cole, 412 U.S. 1, 93 S.Ct. 193 (1973) is significant. Newman was a class action seeking to enjoin racial discrimination at five drive-in restaurants and a sandwich shop. The Court noted:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only.

Id. at 401, 88 S.Ct. 966 (footnote omitted). In Cole v. Hall, 462 F.2d 777 (2d Cir. 1972), aff'd sub nom, Hall v. Cole, supra, Mr. Justice Clark, writing for the Court of Appeals, held that in vindicating the right of free speech of union members under Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §411(a)(2) ". . . he [Cole] was not vindicating his rights of free speech alone but those of every member of the union as well. Indeed, his success in maintaining this right at

[5] Appended hereto is the pertinent portions of the Senate Report.

> As the court recounted in some detail in Alyeska, supra, 421 U.S. at 247, 95 S.Ct. at 1616 passim, the law of the United States, but for a few well recognized exceptions not present in this case, has always been that absent explicit congressional authorization, attorney's fees are not a recoverable cost of litigation. Hence, in order to 'furnish' an award of attorney's fees, we would have to find that at least as cases brought under statutes to which §1988 applies, Congress intended to set aside this longstanding American rule of law. We are unable to conclude, however, from the generalized commands of §1988 that Congress intended any such result.

Id. at 2601 (footnote omitted).

The award of an attorney's fee is not mandatory. The discretionary authority preserved in the amendment indicates a Congressional intent that some prevailing litigants in civil rights actions should not be awarded an attorney's fee. In providing for the award of an attorney's fee in the civil rights area, Congress recognized that such laws, to a large degree, are privately enforced, and that often the citizen who sues to enforce the law is unable to bear the cost of litigation. As was stated in the Senate Report:

> [a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies

union meetings inured to the benefit of union members everywhere." Id. at 780.

Plaintiff's claim is one solely for damages. It is basically a tort action for false arrest and imprisonment couched in the language of a violation of the constitutional right to due process. Only in a general, indirect sense did Zarcone's successful litigation vindicate the public's right to due process. It did so to the degree that every successful plaintiff in a personal injury action vindicates the public's right not to be injured through the negligent conduct of an operator of a motor vehicle, a doctor, or a lawyer.

Prevailing plaintiffs in civil rights actions are not routinely granted attorneys' fees simply because they are awarded damages. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Rather, it is only when plaintiffs advance the public interest by bringing the action that an award of attorneys' fees is proper. The award of damages to this type of litigant does not detract from the concept that their lawyers are acting as private attorneys general. Thus, in actions based on Title VII of the Civil Rights Act of 1964,

litigants who were awarded monetary damages and who also vindicated rights of a class based on race, color or sex have been granted attorneys' fees. E.g., Allen v. Amalgamated Transit Union, Local 788, 415 F. Supp. 662 (E.D.Mo. 1976) (back pay and punitive damages granted on a claim of racial discrimination by the union); Harrington v. Vandalia-Butler Board of Education, 418 F. Supp. 603 (S.D.Ohio 1976) (back pay denied but damages granted on a claim of sex discrimination—female working conditions inferior to those of male); Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C.Cir. 1974) (damages for back pay and harassment granted on claim of sex discrimination by union and employer hotel). Our research has disclosed that in every action brought under Title VII of the Civil Rights Act of 1964 where damages have been awarded and attorneys' fees granted, the interest of the public or an identifiable class has been benefited./6

/6 Appended hereto are all reported Title VII cases in which damages and attorneys' fees were awarded.

We find support for our position in Fort v. White, 530 F.2d 1113 (2d Cir. 1976).[7] In discussing the factors it considers in awarding attorneys' fees to prevailing parties in private fair housing suits pursuant to 42 U.S.C. §3612(c),[8] the Court stated:

> The award of counsel fees encourages private enforcement of statutes directing the elimination of discriminatory practices . . . . An award of counsel fees [encourages] individuals to seek judicial relief which, through the injunctive remedy [achieves] success not only for the individual plaintiff but others similarly circumstanced. §3612(c) however as we have noted provides for actual as well as punitive damages so that the successful litigant in the usual case will be able to pay his counsel fees out of damages; hence we cannot accept the argument that every successful litigant is entitled to counsel fees as a matter of course.

Id. at 1118.

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[7] Fort v. White, supra, was a claim based on Title VIII of the Civil Rights Act of 1968 (discrimination in housing). Plaintiff claims that defendant, a real estate managing agent, discriminated against blacks. Plaintiffs sought declaratory judgment, compensatory and punitive damages and attorneys' fees. Plaintiff waived compensatory damages; the court affirmed the finding of no punitive damages and reversed the denial of attorneys' fees. The United States filed an action based on defendant's discriminatory practices which was settled by a consent decree enjoining the illegal practices and mandating an affirmative action plan.

[8] This statute provides that:

(continued on page 10)

In directing the award of counsel fees, the Court further said:

> It is a matter of discretion for the trial judge but in the exercise of that discretion the role of counsel acting not only on behalf of his client but others similarly situated cannot be ignored. In view of this contribution we feel that the plaintiffs may be recognized as having rendered substantial service to the community and that on this basis attorneys' fees should be awarded.[9]

Id. at 118-19.

The motion for the award of counsel fees is in all respects denied, and it is

SO ORDERED.

U. S. D. J.

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[8] (continued)

> (c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

[9] The court found that plaintiffs' counsel (i) furnished the Department of Justice with information concerning racial discrimination practiced by defendant, and (ii) actively participated in the negotiation of the consent decree.

APPENDIX I

ATTORNEY'S FEES AWARDS ACT
P.L. 94-559

considered the same, reports favorably thereon and recommends that the bill do pass.

* * * * * * * * * *

PURPOSE

This amendment to the Civil Rights Act of 1866, Revised Statutes Section 722, gives the Federal courts discretion to award attorneys' fees to prevailing parties in suits brought to enforce the civil rights acts which Congress has passed since 1866. The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)[1], and to achieve consistency in our civil rights laws. . . .

[1] 95 S.Ct. 1612, 4 L.Ed.2d 141.

STATEMENT

The purpose and effect of S. 2278 are simple—it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866. S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–3(b) and 2000e–5(k), and section 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e). All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

[page 3]

Congress recognized this need when it made specific provision for such fee shifting in Titles II and VII of the Civil Rights Act of 1964:

> When a plaintiff brings an action under [Title II] he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts. Congress therefore enacted the provision for counsel fees—* * * to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[2]

The idea of the "private attorney general" is not a new one, nor are attorneys' fees a new remedy. Congress has commonly authorized attorneys' fees in laws under which "private attorneys general" play a significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws, including, among others, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(c) and 78r(a), the Servicemen's Readjustment Act of 1958, 38 U.S.C. § 1822(b), the Communications Act of 1934, 42 U.S.C. § 206, and the Organized Crime Control Act of 1970, 18 U.S.C. § 1964(c). In cases under these laws, fees are an integral part of the remedy necessary to achieve compliance with our statutory policies. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum-Griffin),

> Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall* v. *Cole*, 412 U.S. 1 (1973),[3] quoting 462 F. 2d 777, 780–81 (2d Cir. 1972).

The remedy of attorneys' fees has always been recognized as particularly appropriate in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area, Congress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws.[1] The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870, 16 Stat. 140, which provided for attorneys' fees in three separate provisions protecting voting rights.[2]

Modern civil rights legislation reflects a heavy reliance on attorneys' fees as well. In 1964, seeking to assure full compliance with the Civil Rights Act of that year, we authorized fee shifting for private suits establishing violations of the public accommodations and equal employment provisions. 42 U.S.C. §§ 2000a–3(b) and 2000e–5(k). Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions.

[1] For example, the Civil Rights Act of 1866 directed Federal courts to "use that combination of Federal law, common law and State law as will be best adapted to the object of the civil rights laws." *Brown* v. *City of Meridian, Mississippi*, 356 F. 2d 602, 605 (5th Cir. 1966). See 42 U.S.C. § 1988; *Lafton* v. *City of Hattiesburg, Mississippi*, 333 F. 2d 280 (5th Cir. 1964).

[2] The causes of action established by these provisions were eliminated in 1894. 28 Stat. 36.

[2] 88 S.Ct. 964, 19 L.Ed.2d 1263.

[3] 93 S.Ct. 103, 35 L.Ed.2d 702.

E.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c); the Emergency School Aid Act of 1972, 20 U.S.C. § 1617; the Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b); and the Voting Rights Act Extension of 1975, 42 U.S.C. § 1973*l*(e).

These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy. Before May 12, 1975, when the Supreme Court handed down its decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975)[4], many lower Federal courts throughout the Nation had drawn the obvious analogy between the Reconstruction Civil Rights Acts and these modern civil rights acts, and, following Congressional recognition in the newer statutes of the "private attorney general" concept, were exercising their traditional equity powers to award attorneys' fees under early civil rights laws as well.[3]

These pre-*Alyeska* decisions remedied a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in *Alyeska*, the United States Supreme Court, while referring to the desirability of fees in a variety of circumstances, ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the "private attorney general" theory. The Court expressed the view, in dictum, that the Reconstruction Acts did not contain the necessary congressional authorization. This decision and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII of the 1964 Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights. Likewise, fees are allowed in a suit under Title II of the 1964 Civil Rights Act challenging discrimination in a private restaurant, but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution or laws by officials sworn to uphold the laws.

This bill, S. 2278, is an appropriate response to the *Alyeska* decision. It is limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent.

It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).[4]

[3] These civil rights cases are too numerous to cite here. See, e. g., *Sims* v. *Amos*, 340 F. Supp. 691 (M.D.Ala.1972), aff'd, 93 S.Ct. 220, 409 U.S. 942, 34 L.Ed.2d 215 (1972); *Sanford Daily* v. *Zurcher*, 358 F.Supp. 18 (N.D.Cal.1973); and cases cited in *Alyeska Pipeline*, *supra*, at n. 46. Many of the relevant cases are collected in "Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcom. on Representation of Citizen Interests of the Senate Comm. on the Judiciary," 93d Cong., 1st sess., pt. III, at pp. 853-1021, and 1050-62.

[4] 88 S.Ct. 964, 19 L.Ed.2d 1263. In the large majority of cases the party or parties seeking to enforce such rights will be the plaintiffs and/or plaintiff-intervenors. However, in the procedural posture of some cases, the parties seeking to enforce such rights may be the defendants and/or defendant-intervenors. See, e. g., *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

[4] 95 S.Ct. 1612, 44 L.Ed.2d 141.

This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's May decision. It does not change the statutory provisions regarding the protection of civil rights except as it provides the fee awards which are necessary if citizens are to be able to effectively secure compliance with these existing statutes. There are very few provisions in our Federal laws which are self-executing. Enforcement of the laws depends on governmental action and, in some cases, on private action through the courts. If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.

* * * * * * * * * *

APPENDIX II

SECOND CIRCUIT

Equal Employment Opportunity Commission v. Enterprise Ass'n Steamfitters Local No. 638 of U.A., 542 F.2d 579 (2d Cir. 1976) (back pay granted).

FOURTH CIRCUIT

Younger v. Glamorgan Pipe & Foundry Co., 418 F. Supp. 743 (W.D.Va. 1976) (injunction, back pay sought; injunction, back pay granted).

FIFTH CIRCUIT

Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1976) (back pay granted); Sagers v. Yellow Freight System, Inc., 529 F.2d 721 (5th Cir. 1976) (back pay granted); Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974) (declaratory relief, injunction, back pay sought and granted); Baxter v. Savannah Sugar Refining Co., 495 F.2d 437 (5th Cir. 1974) (injunction, back pay sought; back pay granted); Peters v. Missouri Pacific R.R. Co., 467 F.2d 490 (5th Cir. 1973) (back pay and reinstatement granted); Weeks v. Southern Bell Tel.& Tel.Co., 467 F.2d 95 (5th Cir. 1972) (injunction and back pay granted); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (back pay granted); Culpepper v. Reynolds Metals Co., 442 F.2d 1078 (5th Cir. 1971) (injunction and declaratory relief sought; back pay granted); Smith v. Fletcher, 393 F. Supp. 1366 (S.D.Tex. 1975) (back pay granted); Bing v. Roadway Express (N.D.Ga. May 19, 1972), vacated, 485 F.2d 441 (5th Cir. 1973)(back pay, injunction granted).

SIXTH CIRCUIT

Singer v. Mahoning County Bd. of Mental Retardation, 519 F.2d 748 (6th Cir. 1975) (back pay granted).

EIGHTH CIRCUIT

Howard v. Ward County, 418 F. Supp. 494 (D.N.D. 1976) (injunctive relief and back pay sought and granted); Taylor v. Ford Motor Co., 392 F. Supp. 254 (W.D.Mo. 1974) (back pay granted).

NINTH CIRCUIT

Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir. 1975) (back pay and injunction sought and granted);Kaplan v. International Alliance of Theatrical & Stage Employees and Motion Picture Operators of United States and Canada, 525 F.2d 1354 (9th Cir. 1975) (back pay and injunction sought and granted); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) (back pay sought and granted).

TENTH CIRCUIT

Taylor v. Safeway Stores Inc., 524 F.2d 263 (10th Cir. 1975) (back pay sought and granted); Muller v. U.S. Steel Corp., 509 F.2d 923 (10th Cir. 1975) (injunction and back pay granted); Fabian v. Ind. Sch. Dist. No. 89 of Okl. Cty, Okla., 409 F. Supp. 94 (W.D.Okla. 1975) (declaratory relief and back pay granted); Tidwell v. American Oil Co., 332 F. Supp. 424 (D.C.Utah 1971) (back pay, injunction sought and granted).

DISTRICT OF COLUMBIA

McMullen v. Warner, 415 F. Supp. 1163 (D.D.C. 1976) (injunction denied, back pay granted).

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